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No. —

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Supreme Court of t
OCTOBER TE

THOMAS E. BENNETT,
THEODORE BLACK and

v.

COMMISSIONER OF INT

On Petition for a Writ o
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DAN A. BENNETT,
MARILYN BLACK,
Petitioners,

ERNAL REVENUE,
Respondent.

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Certiorari to the
of Appeals
Circuit

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RT A. SMITH *
Madison Avenue
York, New York 10022
759-8285
ney for Petitioners
nsel of Record

096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the penalty prescribed by Section 6653(a) of the Internal Revenue Code for negligence can be imposed where the taxpayer's returns were prepared in good faith reliance upon the opinions of a reputable law firm and an officer of a major bank and its tax department, on the ground that these advisers were not expert in the particular technology underlying the taxpayer's investment.

LIST OF PARTIES

The only parties to this proceeding are Thomas E. Bennett, Joan A. Bennett, Theodore Black, Marilyn Black, and the Commissioner of Internal Revenue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

THOMAS E. BENNETT, JOAN A. BENNETT,
THEODORE BLACK and MARILYN BLACK,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Thomas E. Bennett, Joan A. Bennett, Theodore Black, and Marilyn Black hereby petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1a-2a) is not officially reported. The memorandum findings of fact and opinion of the Tax Court (App., *infra*, pp. 3a-32a) are not officially reported.

JURISDICTION

The judgments of the court of appeals were entered on December 26, 1997 (App., *infra*, 1a-2a). By order dated March 10, 1998, Justice Ginsburg extended the time

within which a petition for a writ of certiorari could be filed to and including April 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The provisions of Section 6653(a) of the Internal Revenue Code of 1986 (26 U.S.C.) are set forth at App., *infra*, pp. 37a-38a.

STATEMENT

During 1981, petitioners [1] invested in a limited partnership that leased machines designed to recycle styrofoam scrap material into pellets that could be used to manufacture recycled plastic. On their tax return for that year, petitioners claimed the investment tax and business energy credits in reliance upon an opinion of a distinguished tax lawyer, and in further reliance upon the investigatory work of an officer of a major bank and its tax department, which independently confirmed the conclusions of the lawyer's opinion. Despite petitioners' reliance upon such independent advice from professionals attached to established institutions with which they had longstanding relationships, the decision below held that petitioners were liable for the negligence penalty because their advisers were not experts in the particular technology underlying petitioners' investment.

The pertinent facts can be summarized as follows: During the taxable year at issue (1981), petitioners were senior executives with Ingersoll Rand, where they had spent their entire life-long careers. The Chairman of Ingersoll Rand, William Wearly, was a member of the board of Bankers Trust. As a result, Bankers Trust had been retained by Wearly to provide financial counseling

[1] Unless otherwise indicated, references to the "petitioners" are to both Thomas E. Bennett and Theodore H. Black. Their wives, Joan Bennett and Marilyn F. Black, are parties to this proceeding solely because they filed joint returns with their husbands for the years at issue.

to the senior executives of his company (R. 183).[2] This program was undertaken because Wearly recognized that the arduous nature of the duties of his fellow officers left them little time to attend to their personal financial affairs (R. 175-76). Beginning in 1978, petitioner Bennett sought and received the advice of Bankers Trust with respect to estate planning and the ownership of insurance policies. In due course, the Bankers Trust officer who was responsible for the Ingersoll Rand account was Edward Gallagher, a vice president (R. 183-84).[3]

From time to time, Gallagher would recommend investment opportunities to the Ingersoll Rand executives. One of these investments involved a real estate opportunity sponsored by Daeske & Company. With respect to the Daeske opportunity, both Gallagher and Bankers Trust performed the necessary due diligence and positively recommended Daeske to the Ingersoll Rand executive group. After performing the necessary investigatory work, Gallagher considered himself qualified to introduce the Ingersoll Rand group to Daeske, even though he did not hold himself out to be an expert in real estate (R. 245-46). During his discussions with Gallagher, petitioner Bennett consistently emphasized his need for high quality investments. As a result, Gallagher recommended various real estate investments involving the Daeske organization

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[2] "R." references are to the joint appendix filed in the court of appeals.

[3] Gallagher was a member of Bankers Trust Company's personal financial planning department, which was established to work with bank customers in the areas of personal finances, estate planning, income tax planing, which was done through the bank's tax department, and retirement planning (R. 242-43). Gallagher had received special training for his assignment under the auspices af Bankers Trust Company. He had attended special programs within the bank itself, and participated in training administered by the American Institute of Banking. Moreover, when Bankers Trust established the financial planning program, Gallagher and his colleagues were trained by outside consultants (R. 243).

in which petitioner Bennett invested and earned substantial profits (R. 187).[4]

In early November 1981, Gallagher brought the Sentinel Recycler investment to the attention of petitioners Bennett and Black. As part of his investigation into the investment on behalf of the Ingersoll Rand group, petitioner Bennett held several long conversations with Gallagher with respect to the qualifications of the people involved in the investment. At petitioner Bennett's insistence, Gallagher made a special trip to Hyannis to inspect the equipment at the manufacturer's plant, and thereafter orally reported his finding to the Ingersoll Rand group (R. 189, 194). Gallagher told the group that the manufacturer of the recyclers, Packaging Industries, was a substantial going concern and confirmed its representations that it had been in business 40 years, that it commanded a 90 percent market share in blister packs, and that some of the major Fortune 500 industrial companies had ordered recyclers (*Id.*). Thereafter, Gallagher prepared a written report of his findings that he circulated to the Ingersoll Rand group of executives (R. 1091, 196-97).[5] In his report to the Ingersoll Rand group, Gallagher advised that the process of the Recycler was considered to be proprietary (R. 220-221). Petitioner Bennett therefore had no means available to confirm the accuracy of the representation by Packaging Industries to Gallagher that the machine was unique (R. 221). However, in light of his own professional experience, Bennett recognized that the price for such a proprietary machine turned principally on its economic benefit to the customer, rather than its cost of production (R. 222, 229).

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[4] Bennett also earned a substantial return on an investment in a cable television company that was recommended to him by Bankers Trust (R. 188-89).

[5] In his written report, Gallagher stated that he had observed the Recycler in operation and that the manufacturer's facilities were impressive and compared favorably with those of Ingersoll Rand (R. 1091).

As a result of their positions at Ingersoll Rand, Bennett and Black relied upon the work of the law firm of Windels, Marx, Davies & Ives. This New York City law firm was the principal law firm that Ingersoll Rand employed for general corporate matters relating to acquisitions, divestitures, contracts, etc. During their careers at Ingersoll Rand, both Bennett and Black had worked intensely with several of the partners at the Windels firm. As a result, they had a high regard for their integrity and found the Windels partners with whom they worked to be "very impressive people." (R. 198-99). The Windels law firm had been engaged to prepare the offering memorandum and tax opinion associated with the Recycler investment (R. 452).

Prior to making their investments, both Bennett and Black spent five or six hours reading the offering memorandum and comprehensive tax opinions of John Taggart, who was the senior tax partner of Windels Marx (R. 211, 316, 317, 331-332). Taggart was a well-known tax lawyer practicing with the Windels firm.[6] Taggart first learned of the Sentinel Recycler from Elliot Miller, a long-time friend, who was counsel to Packaging Industries, the manufacturer of the machine. Miller had asked the Windels firm if it would be interested in handling the tax and securities work in connection with an offering memorandum involving an investment in the Recyclers. After Taggart consulted with his colleagues, they concluded that it was something that should be further considered (R. 753).

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[6] Pursuant to stipulation, the testimony of John Taggart in *Provizer v. Commissioner*, 62 T.C.M. (CCH) 2531 (1992), *aff'd per curiam*, 996 F.2d 1216 (6th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994), is included in the record in these cases (R. 748). Taggart's professional credentials reflected a distinguished professional background. He had previously practiced at the law firm of White & Case, had served in the office of the Tax Legislative Counsel in the U.S. Treasury Department, and had been a full-time member of the faculty of New York University Law School and editor-in-chief of the Tax Law Review. In conjunction with his private practice, Taggart continued to be an adjunct member of the New York University law faculty (R. 749).

At the outset, Taggart undertook a thorough investigation of the investment. He did not wish to become associated with the transaction unless he was confident that the investment was legitimate and the value of the recyclers claimed by Packaging Industries was supportable (R. 754, 758). As part of his investigation, Taggart conferred with numerous people connected with the investment, including Miller (R. 756). In addition, Taggart reviewed a report on Packaging Industries prepared by Dun and Bradstreet (R. 754). Taggart also traveled to Hyannis, Massachusetts, where Packaging Industries' plant was located (R. 754, 757). Taggart toured Packaging Industries' facilities and inspected the Recycler in operation (R. 756-58). The officials at Packaging Industries represented to Taggart in writing that the recyclers were unique (R. 778). They also represented to Taggart in writing that the price for the recyclers was their fair market value and was equivalent to the price that Packaging Industries would charge to a third party. The price for the Recycler had been computed in accordance with the well-established method of measuring the stream of royalty income that the recyclers were expected to generate through the sale of pellets that would be converted into recycled plastic. Finally, Packaging Industries represented to Taggart that it would be able to place the recyclers with its existing customers for the procesing of expanded foam scrap material into pellets (R. 763).

As part of his due diligence, Taggart also researched the price of the pellet material that the recyclers produced (R. 761-62). In addition, Taggart consulted technical journals and used various other techniques to verify the uniqueness of the recyclers (R. 786-87). Although Taggart attempted to ascertain whether there was any other comparable recycler, he never could discover a competing machine (R. 778).

Taggart and other members of the Windels firm prepared the offering memorandum, tax opinion, and other

legal documents for Recycling Associates and numerous other similar transactions. In drafting these documents, Taggart was satisfied that he and his firm had performed sufficient due diligence with respect to the investment, that the price being paid for the recyclers was its fair market value, and that there was an appropriate market for the material produced by the recyclers. (R. 774, 778).[7]

The tax opinion prepared by Taggart (R. 565) was 67 pages long and thoroughly discussed all of the issues. After considering the facts and the applicable law, the opinion concluded that "There is little doubt that if questions are raised by the Internal Revenue Service with respect to these issues, they will be resolved in favor of the Partnership." Accordingly, the Windels firm opined that "it is substantially more likely than not that the tax results anticipated by the Partnership will be achieved." (R. 629).[8] After reading Taggart's opinion, petitioner

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[7] Included in the offering memorandum were two independent evaluators' reports that concluded that the price paid for the Recycler was fair and reasonable and that the Recycler was operationally reliable and capable of performing its task on a continuous basis (R. 638, 649). The first evaluator's report was written by Dr. Stanley M. Ulanoff, a Professor of Marketing at the School of Business of the City University of New York. Professor Ulanoff rendered his report after his own personal inspection of the Recycler at the Packaging Industries plant. He concluded that the quantity and quality of the pellets to be produced by the Recycler would produce sufficient royalties to the Partnership to establish that the price paid for the Recycler and the rent paid for it by the Partnership were fair and reasonable (R. 645-47). The second evaluator's report was written by Dr. Samuel Z. Burstein, a Professor of Mathematics at New York University. Professor Burstein had particular expertise in internal combustion engine research. Based upon his inspection of the Recycler and his discussions with the key personnel at Packaging Industries, Professor Burstein concluded that it would be operationally reliable and capable of effectively performing the task of polyethylene recycling on a continuous basis (R. 668).

[8] Gallagher emphasized Taggart's opinion in a written memorandum to the Ingersoll Rand group. Gallagher also assured the Inger-

Bennett concluded that it was "quite positive about the overall tax viability of the project." (R. 200). Moreover, Bennett and Black also knew that Gallagher met with Taggart to discuss the transaction and Bennett had read a memorandum of Gallagher describing his meeting with Taggart (R. 200, 318). Thereafter, Bennett met with Gallagher who verified the statements he made in his written memorandum (R. 201).

Petitioners Bennett and Black decided to invest in the plastics recycler partnership after carefully reading Taggart's tax opinion, which concluded that an investor could claim the tax benefits and that the partnership would withstand any Internal Revenue Service examination. They were particularly influenced by the fact that they and their colleagues had worked with several of the partners of the Windels firm and reposed great confidence in the firm, which they knew to be very conservative (R. 205). Moreover, Gallagher had advised Bennett that the Bankers Trust tax department had reviewed Taggart's opinion and had characterized it as "brilliant" (R. 205, 206, 208). Furthermore, Bennett had also read the opinions of the evaluators (see p. 7 n.7, *supra*) who were associated with well-known institutions and found them to be "very straightforward and very convincing." (R. 202). As a result of his reliance upon Taggart's positive opinion, its confirmation by the Bankers Trust tax department, the evaluators' reports, and Gallagher's written and oral reports, and his personal inspection of the recycler and its manufacturer, petitioner Bennett was not concerned that the Internal Revenue Service might challenge the value of the machine (R. 206). Accordingly, in full reliance on the panoply of professional due diligence, at the time Bennett claimed the tax benefits on his 1981 return associated with his investment in the plastics recycling part-

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soll Rand group that "[t]he Partnership has gone to great lengths to justify the valuation and viability of the Recycler." (R. 1097).

nership, he believed them to be entirely appropriate (R. 205-6, 208).

After carefully reviewing the offering memorandum and Taggart's opinion, the reports of the evaluators, and Gallagher's written reports that were prepared after he was sent by Bennett to conduct a personal inspection of the Recycler at the Packaging Industries plant, petitioner Black likewise concluded that the Recycler was priced appropriately by experienced professionals. Based upon the advice of counsel with whom Ingersoll Rand had a longstanding relationship and confirmed by the Bankers Trust tax department, Black also believed that the tax credits he claimed on his 1981 return associated with his plastics recycling investment were entirely appropriate (R. 323, 343).

The Decision Below. Despite petitioners' reliance upon: (1) the Taggart opinion and the record evidence of Taggart's due diligence; (2) the evaluators' reports; (3) the confirmation of the Taggart opinion by the Bankers Trust tax department; (4) the personal inspection of the machine and the manufacturer's plant by Taggart and a Bankers Trust officer; and (5) the representations to Taggart and Bankers Trust that the Recycler was unique, the Tax Court Special Trial Judge held that petitioners were negligent in claiming the tax benefits arising out of their investment in the partnership. In so holding, the Tax Court believed that the petitioners were negligent because their advisers were not experts in plastics recycling technology. In the Tax Court's view, petitioners were subject to the negligence penalty because they "did not independently investigate the . . . Recyclers [or] . . . hire an expert in plastics to evaluate the . . . transaction." (App., *infra*, p. 16a). In this respect, the Tax Court concluded that the petitioners could not reasonably rely upon due diligence of the Bankers Trust officer who investigated both the machinery and the manufacturer be-

cause he "possessed no special qualifications or professional skills in the recycling or plastics industries." (App., *infra*, p. 18a).

The court of appeals affirmed (App., *infra*, pp. 1a-2a). In a brief summary order, the court stated that it "agree[d] with the Tax Court's decision and affirm for substantially the reasons stated in Judge Dawson's opinion . . . (adopting and setting forth Special Trial Judge Wolfe's opinion)" (App., *infra*, p. 2a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals squarely conflicts with decisions of both the Fifth and Tenth Circuits with respect to the question whether the negligence penalty prescribed by Section 6653(a) of the Internal Revenue Code can be imposed when the taxpayer relies upon a tax adviser who is not expert in the technology underlying the investment that gave rise to the taxpayer's claimed tax benefits. These courts have held, in conformity with this Court's ruling in *United States v. Boyle*, 469 U.S. 241 (1985), that a taxpayer's reliance upon the tax advice of an accountant or attorney is sufficient to defeat the imposition of the negligence penalty. On the other hand, the decision below has upheld the Tax Court's holding that a taxpayer is subject to the negligence penalty unless he obtains the advice of an expert who is knowledgeable in the technology underlying the particular investment.

The question of statutory interpretation upon which this case turns has substantial administrative importance. There are thousands of persons throughout the country who have claimed tax benefits as a result of their participation in transactions that are virtually identical to the very investment involving the same equipment at issue in this case. The Commissioner has sought to impose the negligence penalty upon all of these similarly-situated taxpayers. This Court should therefore grant certiorari to

resolve the conflict among the various courts of appeals and establish a uniform national rule for the benefit of both taxpayers and the Internal Revenue Service.

1. Our income tax law depends upon a system of honest self-assessment. However, it is readily acknowledged that the complexity of the statute and the underlying rules and regulations require many individual taxpayers to seek professional advice with respect to their entitlement to various deductions and credits enacted by Congress to encourage certain investments. As a result, taxpayers frequently turn to advisers who provide their clients with guidance with respect to the tax consequences of particular investment activities and their qualification for certain tax benefits. Sometimes, however, the best and most thoughtful advice ultimately turns out not to have the expected result. In such a case, a taxpayer may be subject to adjustments and determinations of income tax deficiencies by the Internal Revenue Service. That is precisely what occurred in these cases. Relying upon the opinions of a reputable law firm and a major bank in which they reposed great confidence, the petitioners invested in widely-marketed limited partnerships and claimed various tax benefits on their 1981 returns. In 1992, after a sharply contested Tax Court trial in 1989 at which the conflicting opinions of experts were submitted, the same Tax Court Special Trial Judge who rendered the decisions below upheld the Commissioner's disallowances in a test case styled *Provizer v. Commissioner*, 63 T.C.M. (CCH) 2531 (1992), *aff'd per curiam*, 996 F.2d 1216 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994). The petitioners here, by stipulation, have conceded their ineligibility for the tax benefits they claimed. However, they seek review of the decision below that their conduct was negligent in 1982 at the time they filed their 1981 tax returns, even though they relied upon unquestionably competent professional tax advice.

The same Tax Court Special Trial Judge who decided the *Provizer* case and the decision below has thus far concluded in approximately 25 virtually identically-worded opinions that almost 50 other taxpayers who invested in similar partnerships were uniformly subject to the negligence penalty despite their reliance on various forms of professional advice. In this Tax Court judge's uniquely expansive and wholly unjustified reading of the negligence penalty, that penalty is applicable if neither the taxpayer nor his advisers are expert in the particular technology, which is the subject of the investment, *viz.*, plastics recycling. But that conclusion is fundamentally unsound and finds no support in the decisional law. To begin with, the negligence penalty is imposed upon conduct relating to the filing of an income tax return, and not, as the decision below would have it, upon the wisdom of the decision to make a particular investment.

At all events, the records in these cases are replete with evidence—which the Tax Court and the court of appeals totally disregarded—that petitioners' advisers did everything possible to confirm the reputation of the principals of the manufacturer of the machinery and the accuracy of the evaluation reports and financial projections that were made a part of the offering memorandum. They visited the factory, inspected the machinery in operation, took account of end-users who employed the machinery in their plants, undertook research in technical journals, and conferred with knowledgeable persons in the plastics industry. Petitioners' reliance upon their advisers' conclusions was therefore well placed.

In these circumstances, the law does not require that the adviser be expert in the particular technology underlying a transaction as long as he undertakes appropriate independent and conscientious investigation and makes those facts known to his client. If that is the case, the taxpayer's reliance upon the adviser is reasonable. Given

the due diligence of petitioners' advisers, which included the distinguished author of the tax opinion who was a member of a reputable law firm and the officer of a substantial bank with which petitioners had longstanding business relationships, the record demonstrates that they relied upon professional advice they reasonably believed to be competent in deciding to make their investment and to claim the tax benefits associated with it. There is accordingly no justification either in law or logic for the imposition of the negligence penalty in these cases.

2. a. When a taxpayer is charged with an underpayment that "is due to negligence or intentional disregard of rules or regulations . . .," Section 6653(a)(1) and (2) of the Code used to impose a penalty equal to 5 percent of the underpayment and 50 percent of the interest on such underpayments. See App., *infra*, pp. 37a-38a. Consistent with the reasonable man standard derived from the law of torts, the negligence penalty does not apply to a taxpayer who files his return in the same manner as a reasonable or ordinary and prudent person would do under the circumstances.

The classic and well-established course of conduct that has long been deemed sufficient to satisfy the reasonable care standard and thereby defeat the imposition of the negligence penalty is for a taxpayer to rely in good faith on the advice of a tax adviser. More than a decade ago in *United States v. Boyle*, 469 U.S. 241 (1985), this Court unanimously ratified the correctness of this rule and explained its rationale in the following terms:

> When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code him-

> self would nullify the very purpose of seeking the advice of a presumed expert in the first place. "Ordinary business care and prudence" do not demand such actions.

469 U.S. at 251 (emphasis in original; citation omitted.)[9] The settled rule that good faith reliance on a tax adviser establishes the reasonableness of the taxpayer's conduct so as to reject the Commissioner's assertion of negligence is entirely appropriate. Indeed, in the absence of such a rule, only those taxpayers with the substantial time and ability necessary to investigate the tax consequences of particular investments themselves would be able to make such investments without fear of penalty. *Heasley v. Commissioner*, 902 F.2d 380, 383-384 (5th Cir. 1990).

b. The decision below is squarely in conflict with *Chamberlain v. Commissioner*, 66 F.3d 729 (5th Cir. 1995); and *Durrett v. Commissioner*, 71 F.3d 515 (5th Cir. 1996), as to which the Tax Court was apparently unaware and which the court of appeals declined to address in its opinion. In those cases, as here, the taxpayers invested in a similarly widely-marketed program. The particular program involved in those cases consisted of complex straddle transactions of forward contracts for government-backed financial securities known as First Western. Although the program promised various tax benefits, it was ultimately held to lack economic substance. Similarly, the taxpayers challenged only the Tax Court's conclusions that they were liable for the negligence penalty. As in these cases, the Tax Court rejected the taxpayers' reliance upon

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[9] Although *Boyle* dealt with the "reasonable cause" exception for non-filer penalties under Section 6651(a)(1) and held that the executor was personally responsible for timely filing of the estate tax return, the courts have uniformly invoked the passage set out above as a standard for measuring reasonable cause for purposes of the negligence penalty. *See, e.g., Heasley v. Commissioner*, 902 F.2d 380 (5th Cir. 1990); *Chamberlain v. Commissioner*, 66 F.3d 729, 733 (5th Cir. 1995); *Durrett v. Commissioner*, 71 F.3d 515 (5th Cir. 1996).

certified public accountants on the ground that the accountants had no specialized knowledge of securities transactions or straddles in forward contracts that were the heart of the First Western program (67 T.C.M. 2992, 2994; 67 T.C.M. 2735, 2742). However, relying upon this Court's teaching in *Boyle* that good faith reliance on professional advice concerning tax laws constitutes a defense against the negligence penalty, the Fifth Circuit unanimously reversed the Tax Court's finding of negligence in these two cases. As the Fifth Circuit flatly stated in *Chamberlain* (66 F.3d at 733; footnotes omitted):

> Taxpayers sought the advice of a tax expert about claiming the loss. The expert advised that there was "a good faith, supportable position" concerning the deductibility of the loss. The Tax Court erred in finding taxpayers negligent for claiming the loss. The record reflects no basis for a finding or conclusion that it was not reasonable for taxpayers to rely on the expert's advice. "To require the taxpayer to challenge the [expert], to seek a 'second opinion,' or to try to monitor [the expert] on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place." Because the taxpayers reasonably relied on the advice of a tax expert in claiming the loss, the negligence penalty should not have been imposed.

In *Durrett*, another panel of the Fifth Circuit applied precisely the same analysis in reversing the Tax Court's imposition of the negligence penalty against another taxpayer who invested in the same program.[10] There, the court observed as follows (71 F.3d at 518):

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[10] Although other circuits have upheld the negligence penalty against other First Western investors, those taxpayers relied upon unqualified advisers. *Freytag v. Commissioner*, 904 F.2d 1011 (5th Cir. 1990), *aff'd* on another ground, 501 U.S. 868 (1991) (adviser unaware of the facts); *Kozlowski v. Commissioner*, 70 F.3d 1279 (9th Cir. 1995), *aff'g* T.C. Memo 1993-430 (no showing adviser understood transaction and was qualified to give opinion); *Chakales v. Commissioner*, 79 F.3d 726 (8th Cir.), *cert. denied*, —— U.S.

> Here the Durretts sought professional advice from their attorney, a tax accountant, and the vice president of finance for the parent corporation of the subsidiary that employed Joseph Durrett. . . . We conclude that the record adequately establishes that it was reasonable for the Durretts to rely on the advice of these experts.

Moreover, the Tenth Circuit has likewise rejected the view adopted by the Tax Court and the court of appeals below that a taxpayer's reliance upon the advice of an expert is justified only if the expert is knowledgeable in the technology underlying the particular investment. In *Anderson v. Commissioner*, 62 F.3d 1266, 1271 (1995), after relying upon *Heasley, supra*, the Tenth Circuit concluded, albeit in *dictum*, that "one does not have to be an expert in an industry before he can invest in the industry himself or recommend an investment to another." That court therefore rejected the Tax Court's holding that the taxpayer was negligent in relying upon a tax expert who lacked knowledge and experience in the cargo container industry. Accord: *Mauerman v. Commissioner*, 22 F.3d 1001, 1006 (10th Cir. 1994); *Hildebrand v. Commissioner*, 28 F.3d 1024 (10th Cir. 1994), *aff'g, Krause v. Commissioner*, 99 T.C. 132 (1992).[11] Indeed, prior to the decision below in these and similar cases involving the

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——, 117 S.Ct. 85 (1996) (adviser relied on promoter of venture); *Foulds v. Commissioner*, 94 F.3d 651 (9th Cir. 1996) (adviser lacked tax expertise). Significantly, the Eighth Circuit in *Chakales* cited *Chamberlain* with approval. See 79 F.3d at 730.

[11] In *Anderson*, the Tenth Circuit ultimately affirmed the imposition of the negligence penalty on the ground that the taxpayer was negligent in signing a substantial promissory recourse note to finance his purchase of the containers without confirming that the containers actually existed. The court concluded that had the taxpayer conducted a reasonable investigation, he would have learned that the program was a sham and that the containers did not exist. 62 F.3d at 1272. These unique facts are not present in the instant cases where the taxpayers did not sign a promissory note and the recyclers unquestionably existed and functioned effectively.

same investment that have been consistently decided in favor of the Commissioner in 25 virtually identically-worded opinions by the same Tax Court Special Trial Judge, it was generally understood under the teaching of *Boyle* that a taxpayer could reasonably rely upon the judgment of a competent tax adviser who undertook a conscientious investigation of the proposed investment.

Thus, as matters now stand, the courts of appeals are in disarray with respect to the application of this Court's *Boyle* standard where a taxpayer relies upon an attorney or tax adviser who is not an expert in the technology underlying the taxpayer's investment. If petitioners were resident in the Fifth or Tenth Circuit, rather than in the Second Circuit,[12] they would have been able to defeat the imposition of the negligence penalty. In the absence of a decision by this Court resolving the conflict among the court of appeals, the treatment afforded to similarly-situated taxpayers will vary based solely upon geographic happenstance. Review by this Court is warranted to avoid continuing uncertainty and disparate application of the revenue laws.

3. The question presented has substantial and continuing importance. While Section 6653(a) as originally enacted in the Economic Recovery Tax Act of 1981 has been repealed by the Omnibus Budget Reconciliation Act of 1989, the critical statutory language penalizing "the portion of any underpayment which is attributable to . . . "[n]egligence" continues to be employed in the new accuracy-related penalty provision of Section 6662(b)(1) and (c) of the Code. Moreover, the Commissioner has publicly acknowledged in his brief to the Sixth Circuit in the *Provizer* case that approximately 2,500 tax returns

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[12] In a non-precedential summary order, the Eleventh Circuit recently affirmed the Tax Court's imposition of the negligence penalty against a taxpayer who invested in a plastics recycling partnership. *Morgan v. Commissioner*, No. 97-4599, decided March 9, 1998.

claimed precisely the same tax benefits that are affected by the decision below for the tax years 1981 and 1982. If we conservatively assume that approximately 2,000 taxpayers invested an average of $12,500 in identical transactions, the negligence penalties against these taxpayers would total approximately $170 million.[13] Given the Commissioner's expansive reading of the negligence penalty in these cases and in other transactions,[14] it is fair to assume that there are many other cases presenting this question that are pending administratively and in the courts. As this Court pointedly observed in *United States v. Boyle, supra,* 469 U.S. at 248, "We need not dwell on the similarities or differences in the facts presented by the conflicting holdings. The time has come for a rule with as 'bright' a line as can be drawn consistent with the statute and implementing regulations (footnote omitted)." Here, too, review by this Court is likewise amply justified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STUART A. SMITH *
551 Madison Avenue
New York, New York 10022
(212) 759-8285
Attorney for Petitioners

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* Counsel of Record

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[13] We calculate this figure in the following manner: The investment of $12,500 in the transaction at issue resulted in the determination of an income tax deficiency of $31,366. Extrapolating a total nationwide dollar investment of $25 million (2,000 × $12,500), the negligence penalty amount would be equal to the sum of 5 percent of the total deficiencies ($3,136,600) plus $170,646,000. The latter figure represents 50% of the interest accruing in these cases from April 15, 1982, to December 31, 1997.

[14] See, *e.g., Greene v. Commissioner,* 75 T.C.M. 1967 (1998).